United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-7149

P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

EVELYN DUTIL,
Administratrix of the Estate of
RAYMOND DUTIL,
Plaintiff-Appellant,

v.

MARLIN M. MAYETTE,
Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

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Docket No. 75-7149

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STATEMENT OF THE CASE

This case is before the Court on appeal from an order of the United States District Court for the District of Vermont, Holden, C. J., dated February 4, 1975, granting defendant Mayette's motion to dismiss for lack of capacity (App. 24). The action is a wrongful death action brought under the District Court's diversity jurisdiction.

Plaintiff was appointed Administratrix of the Estate of Raymond Dutil on November 14, 1972, by the Probate Court within and for the County of Worcester, Massachusetts.

On May 15, 1971, plaintiff's decedent Raymond Dutil was a passenger in a vehicle involved in a collision with a truck operated by defendant, and died as a proximate result of injuries suffered in said collision.

Plaintiff brought suit under Vermont's Wrongful Death Statute (14 V.S.A. §§ 1491-92), and defendant interposed in his answer two affirmative defenses, first, that the action was barred by the Statute of Limitations, and second, that the plaintiff lacked capacity to prosecute the action.

A hearing was held on defendant's affirmative defenses in answer before the Hon. James S. Holden, Chief Judge, United States District Court for the District of Vermont, on January 3, 1975. Following that hearing, defendant filed a motion to dismiss the plaintiff's complaint for, *inter alia*, lack of capacity.

In an order filed February 5, 1975, Chief Judge Holden dismissed the plaintiff's complaint for lack of capacity to bring the suit. In his memorandum and order, Judge Holden held that a plaintiff administratrix appointed in a foreign jurisdiction, who had not procured ancillary letters of administration in Vermont lacked capacity to maintain a wrongful death action in this state, citing *Weinstein v. Medical Center Hospital*, 358 F. Supp. 297 (D. Vt. 1973). Judge Holden in his memorandum and order specifically reserved the question whether the complaint was barred by the Statute of Limitations.

QUESTION PRESENTED

Whether the District Court correctly ruled that a non-resident administratrix was not privileged to institute this action without ancillary letters of administration, despite a ruling of the Vermont Supreme Court to the contrary, where Fed. R. Civ. P. 17(b), provides that matters of capacity involving one acting in a representative capacity shall be determined by the law of the State in which the District Court is held.

ARGUMENT

VERMONT LAW DOES NOT REQUIRE A NON-RESIDENT PERSONAL REPRESENTATIVE TO OBTAIN ANCILLARY LETTERS OF ADMINISTRATION IN VERMONT IN ORDER TO BRING A WRONGFUL DEATH ACTION. THEREFORE, THE DISTRICT COURT SHOULD NOT HAVE DISMISSED PLAINTIFF'S COMPLAINT.

Fed. R. Civ. P. 17(b) provides in part "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the District Court is held. . . ." Although there is some very old law in Vermont limiting the capacity of foreign administrators to perform certain acts in Vermont, *see, e.g., Vaughan v. Barrett*, 5 Vt. 333 (1833), there is no Vermont decision holding that a foreign administrator may not institute a wrongful death action in a Vermont Court.

Title 14 V.S.A. § 1492 states that a wrongful death action "shall be brought in the name of the personal representative of such deceased person." It does not state that only domestic administrators may commence such an action, nor is there any case law to that effect. In the majority of states, wrongful death actions are viewed as purely statutory, and therefore, such statutes may be assumed to state whatever requirements exist for institution of actions thereunder.

In fact, the Vermont Supreme Court has specifically adopted this view. In *Brown v. Perry*, 104 Vt. 66 (1931), a death action was instituted in Vermont by one who was appointed administrator in both New Hampshire, and in an ancillary capacity, in Vermont. The Vermont Supreme Court discussed the plaintiff's capacity to sue in Vermont in the following terms:

> Indeed, although letters of administration have no extra territorial force and therefore apart from statute an administrator has no authority to bring suit otherwise than in the state of his appointment. . . . it has been held that a foreign administrator may maintain an action for wrongful death, under a statute based upon Lord Campbell's Act, since he acts not in his representative capacity, but as trustee for the beneficiaries. . . in *Boulden v. Penn. R. R. Co.*, . . . (205 Pa. pages 270. 271, 54 Atl. 906, 908), it is said that in such case the foreign administrator "acts therefore, not by virtue of authority which the Probate Court gave him when it granted him the power to administer the estate of the deceased, but solely by virtue of the authority vested in him by the statute," and that the "right of action might have been conferred upon the beneficiar-

> ies themselves, or upon any private person or public official; and, if it had been, it is too clear for argument that there could be no question of the right of the person or official thus designated to maintain the action" in another state. The plaintiff, in his declaration, has alleged his appointment as administrator in New Hampshire as well as in Vermont, as *so the action is maintainable by him in either capacity.*

104 Vt. 66, 71 (emphasis added).

In *Weinstein v. Medical Center Hospital*, 358 F. Supp. 297 (D. Vt. 1972), the court cited several old Vermont cases in support of the statement that "A foreign administrator is without standing to prosecute the claim of his decedent unless authorized by ancillary letters issued here." The cited cases, as mentioned above, do prohibit a foreign administrator from performing certain acts within Vermont. However, none of the cited cases deals with the right of a foreign administrator to bring a wrongful death action in Vermont without having obtained ancillary letters of administration from a Vermont court.

In *Weinstein*, the court attempted to distinguish *Brown v. Perry, supra*, by pointing out that ancillary letters of administration had in fact been issued by a Vermont court. 358 F. Supp. 297, 299. However, that fact made no difference to the Vermont Supreme Court's decision. The court said "The action is maintainable by him (the administrator) in either capacity." 104 Vt. 66, 71. Therefore, the district court's analysis of *Brown v. Perry* in *Weinstein* was erroneous.

In *Weinstein*, the court also mentioned the 1961 amendment to the Vermont Wrongful Death Statute, which states that the distribution of the amount recovered in a wrongful death action shall be distributed in proportion to the pecuniary injuries suffered. The amendment further provides for a hearing before the Superior Court or a single Superior Judge and sets out certain standards for distribution. In *Dennick v. R. R. Co.*, 103 U. S. 11 (1880), the defendant argued against allowing a foreign administrator to bring an action based on the New Jersey Wrongful Death Action on the ground that the foreign administrator could not be compelled to distribute the amount received in accordance

with the New Jersey statute. 103 U. S. 11, 20. The Supreme Court held that any court having control of the administratrix could compel the distribution of the amount received in the manner provided in the New Jersey statute, saying:

> It would be a reproach to the law of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs.

103 U. S. 11, 20.

Moreover, the cited amendment does not require that the distribution proceeding be a part of the same action as the wrongful death suit. Indeed, when an action is brought in or removed to the federal court, a separate hearing in state courts is necessary. In the event of a recovery in the instant case, and assuming, *arguendo*, that the proceedings outlined in 14 V.S.A. § 1492(c) do have to be held in the Vermont courts, there is nothing to prevent the plaintiff from obtaining ancillary letters of administration at that time.

The modern trend in wrongful death actions is to allow a personal representative to bring suit without securing ancillary letters in the foreign state. In *Siverling v. Lee*, 90 F. Supp. 659 (E.D. Mich. 1950), the court allowed an out-of-state personal representative to bring a wrongful death action in spite of a Michigan statute that stated that the public policy of the state required that all persons acting in a representative capacity under appointment of a Probate Court, as fiduciary, be amenable to process, and required a state resident as fiduciary. The court stated:

> (T)he courts are increasingly according recognition to the principle that a personal representative suing as a special statutory trustee for the benefit of dependents of the decedent shall be entitled to maintain the suit on his original letters, in any jurisdiction where the wrongdoer may be found, without securing ancillary letters at the forum.

90 F. Supp. 659-62.

This trend is especially pronounced where the recovery is sought for the benefit of beneficiaries designated in the statute rather than where recovery is sought for the benefit of the deceased's general estate. *See, e.g., Bradshaw v. Moyers,* 152 F. Supp. 249 (S.D. [illegible] 1957); *Kent v. Kansas Power & Light Co.,* 123 F. Supp. 662 (D. Kan. 1954); *Reed v. Shilcutt,* 119 F. Supp. 6[illegible] E.D. Va. 1946). An examination of 14 V.S.A. § 1492 shows that the statute is of this kind. *See Brown v. Perry,* 104 Vt. 66, 71 (1931).

In *Ashley v. Read Construction Co.,* 195 F. Supp. 727 (D. Wyo. 1961), the court held that there was nothing in the Wyoming Wrongful Death Statute to indicate an intent on the part of the Wyoming Legislature to exclude a non-resident administrator from acting as personal representative, saying:

> (T)he statute upon which the action is brought was intended to provide a remedy not only for citizens of this state but for citizens of other states while passing through or residing within the state. The amount recovered under the statute is held by the personal representative for the person entitled thereto. The whole import of the Wrongful Death Act is to benefit those persons who have been injured because of the death of their relative. . . . It is not within the province of this Court to qualify the statutory provision "personal representative" by interpolating the words "who is a resident of this state", or "who is appointed in this state", or "who is amenable to the jurisdiction of this state". It would appear to make little difference what title the special representative might possess, whether it be administrator or executor, foreign or domestic, so long as the amount collected inures to the benefit of the person designated by law.

195 F. Supp. 727, 729.

The court went on to note a difference between an administrator acting as personal representative and the administrator of an estate. The only duty of a personal representative is to collect the amount received as damages and distribute it in the manner provided by law. Similarly, the Vermont Wrongful Death Statute contains nothing to indi-

cate an intent on the part of the Legislature to require that a plaintiff-personal representative in a wrongful death action have Vermont letters. Under the distribution scheme set out in 14 V.S.A. § 1492(c), the plaintiff administratrix in the instant case will take the entire proceeds of the action, as she is the surviving spouse and there are no children.

Even assuming, *arguendo*, that Vermont law required a personal representative to secure ancillary letters of administration in Vermont in order to prosecute a wrongful death action, the District Court should not have dismissed the action, but should have allowed the plaintiff time to secure ancillary letters of administration. In *Deupree v. Levinson*, 186 F.2d 297 (6th Cir. 1950) the court said:

> It is a long-established rule in the federal courts that administrators are permitted to secure and perfect ancillary administration in states where the decedents were non-residents, even after the running of the Statute of Limitations. A lack of letters of administration may be cured or an objection of want of capacity to sue may be avoided by substitution of the proper party at any time before hearing, and later appointments of this nature relate back and validate the proceedings from the beginning.

186 F.2d 297, 301.

Indeed, in the hearing before the District Court, Judge Holden indicated that he would allow plaintiff an extension to secure ancillary letters in Vermont (App. 19-22). Thus, should the court find that the lower court was correct in its conclusion that Vermont law requires a personal representative to secure ancillary letters of administration, it should remand the case to the lower court with instructions to the court to allow plaintiff time to secure ancillary letters of administration.

CONCLUSION

Vermont law permits a foreign administrator to bring a wrongful death action without securing ancillary letters of administration in Vermont, in line with the modern trend in other jurisdictions. Even if plaintiff must have ancillary letters in Vermont, she should be allowed time to secure such letters.

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April 22, 1975

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United States Cour of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Dutil v. Mayette (75-7149)

WE ENCLOSE THE FOLLOWING: Certificate of Service and Briefs for filing.

DOWNS, RACHLIN & MARTIN

BY
Glenn A. Jarrett

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EVELYN DUTIL, Administratrix of the Estate of RAYMOND DUTIL	*	
v.	*	CERTIFICATE OF SERVICE
MARLIN M. MAYETTE	*	

I, Robert D. Rachlin, a member of the firm of Downs, Rachlin & Martin, hereby certify that I mailed 25 copies of the brief in the above-captioned matter and 10 copies of the Appendix to the Court of Appeals, and I mailed 2 copies of the brief and one copy of the Appendix to John M. Dinse, Esquire, postage prepaid, at their usual addresses, on April 22, 1975.

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By: _____
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